

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LYNN JONES,

Defendant-Appellant.

UNPUBLISHED
February 14, 2006

No. 253146
Oakland Circuit Court
LC No. 03-188616-FC

Before: Donofrio, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of armed robbery, MCL 750.529, kidnapping, MCL 750.349, four counts of first-degree criminal sexual conduct, MCL 750.520b (multiple variables), one count of second-degree criminal sexual conduct, MCL 750.520c, carrying a concealed weapon, MCL 750.227, and using a financial transaction device without consent, MCL 750.157n(1). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 50 to 75 years' imprisonment for each of the armed robbery, kidnapping, and first-degree criminal sexual conduct convictions, and 10 to 15 years' imprisonment for each of the second-degree criminal sexual conduct, carrying a concealed weapon, and using a financial transaction device without consent convictions, with the sentences to be served consecutive to his parole violation. We affirm.

On appeal, defendant contends that he was denied the effective assistance of counsel. We disagree.

The determination of whether a defendant was denied the effective assistance of counsel is a combined question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We review a trial court's findings of fact for clear error and constitutional determinations de novo. *Id.* at 484-485.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness as guaranteed by the Sixth Amendment, and (2) that counsel's performance prejudiced the defendant, which requires a showing of the existence of a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *People v Rockey*, 237

Mich App 74, 76; 601 NW2d 887 (1999). A defendant must also overcome the presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *Carbin*, *supra* at 600.

Defendant lists numerous instances of allegedly erroneous conduct by his trial counsel, including his failure to adequately file, appear at and prepare for pretrial motions, file jury instructions, give an opening statement, present an adequate closing argument, cross-examine witnesses, object to identification and testimonial evidence that was cumulative, object to allegedly hearsay evidence, object to questions leading the witnesses and seeking the jury's sympathy and object to improper impeachment of the alibi witness. After review of the record, including the transcripts of the *Ginther*¹ hearing at which defendant testified on his own behalf, we conclude that defendant fails to show in most of the instances that his trial counsel performed in a manner that was objectively unreasonable. Moreover, as the trial court held following the evidentiary hearing on this matter, even where counsel's performance could be construed as deficient in any respect, defendant failed to prove resulting prejudice. There was overwhelming evidence of defendant's guilt. On the day after the incident, the victim identified defendant as the perpetrator from a photographic array. At trial, she repeatedly identified defendant as the perpetrator. She also gave detailed testimony regarding the occurrences of that night. She testified that defendant forced her from her vehicle at knife-point and into a white van that she had recognized as being at a convenience store just a few minutes before. Defendant handcuffed her, forced her to lie on her stomach on the floor of the van and took her ATM card from her purse. Defendant told her that he had been watching her for a few days and warned her to do as he said or he would kill her and her family. Defendant then sexually assaulted her multiple times while she was inside the van. Defendant drove to a motel, rented a room and forced her into the room where he made her remove her clothes and raped her. Defendant released her, warning her not to call the police.

Additionally, there was DNA evidence that a hair found on the floor of defendant's van matched the victim's DNA. There was fingerprint evidence found on a cup in the motel room that matched the victim's fingerprint. There was also fingerprint evidence found on a magazine in defendant's van that matched his fingerprint. The prosecution offered the testimony of the convenience store clerk who stated that she saw the victim in the store around the time of the incident. The prosecution also offered the testimony of the motel clerk who identified defendant as the man that had rented the subject room that night. The motel clerk also testified that she noticed that, when the information defendant wrote on the motel registration card did not match the information on his driver's license, she wrote the information from the driver's license on the back of the registration card. On cross-examination, the motel clerk admitted that she did not identify defendant from a photographic array that took place the day following the incident. The prosecution presented a bank representative who testified that the victim's ATM card was used to make two withdrawals totaling \$1,000 from her bank account on the night in question and the

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

following morning. The prosecution also presented the testimony of defendant's cellblock mate who indicated that defendant admitted to committing the charged crimes.

In contrast, defendant presented his brother as his only witness. His brother testified that he observed defendant in the barn of the brother's home in Lapeer County on the night in question. On cross-examination, his brother admitted that he did not contact the police about this alibi.

Prejudice requires a showing that there exists a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Carbin, supra* at 599-600. The record shows that the prosecution presented overwhelming evidence of defendant's guilt. Defendant fails to identify a defense or evidence that trial counsel failed to present that may have countered the prosecution's case against him. Accordingly, we conclude that the trial court did not err in concluding that a new trial was not warranted based on defendant's ineffective assistance of counsel claim because there is no reasonable probability that trial counsel's conduct at issue would have changed the result of this trial, and therefore, defendant failed to overcome the presumption that he received the effective assistance of counsel. Furthermore, because trial counsel's performance was not objectively unreasonable and, even if trial counsel erred, no errors were unfairly prejudicial to defendant, we conclude that defendant was not denied a fair trial based on the cumulative effect of errors. See *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

In a related argument, defendant contends that the presumption that trial counsel's performance constitutes sound trial strategy is inapplicable where, as here, counsel failed to perform basic investigation and preparation for the case. "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *Grant, supra* at 486. "Counsel must make 'an independent examination of the facts, circumstances, pleadings and laws involved . . .'" *Id.* at 486-487, quoting *Von Moltke v Gillies*, 332 US 708, 721; 68 S Ct 316; 92 L Ed 309 (1948).

Regarding trial counsel's preparedness and familiarity, defendant testified at the evidentiary hearing that counsel met with him on several occasions and that he spoke with counsel throughout the trial. Although defendant contended that counsel lost his file just before trial, there was evidence that counsel was able to use defendant's file instead. At trial, counsel elicited testimony from the motel clerk that she initially failed to identify defendant from the photographic lineup. Counsel also elicited information that the police lost the motel registration card allegedly containing defendant's name. Counsel presented a defense, asserting that the victim misidentified defendant as the perpetrator and calling an alibi witness. Defendant admitted that he never filed a grievance against his trial counsel and never fired counsel or complained to the trial court about his performance during trial. Accordingly, we conclude that defendant fails to establish from the facts that there was an overall lack of preparedness and familiarity with the case on the part of counsel.

Next, defendant claims that the trial court improperly excluded expert testimony regarding the standard of care of legal representation in a criminal sexual conduct case.

Defendant contends that expert testimony was particularly relevant in this case because trial counsel was declared unavailable and did not testify at the *Ginther* hearing.² We disagree.

We review for an abuse of discretion the trial court's determination regarding the admissibility of expert witness testimony. *In re Wentworth*, 251 Mich App 560, 562-563; 651 NW2d 773 (2002). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no excuse for the ruling made." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A decision on a close evidentiary question ordinarily cannot be deemed an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

MRE 702 governs the admissibility of expert testimony and provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

At issue in this case is the threshold question of whether the proposed testimony would assist the factfinder to understand the evidence or to determine a fact in issue. Defendant sought to admit the expert testimony of an attorney to offer the standard for legal representation in a criminal sexual conduct case and to opine that trial counsel for defendant performed in a manner that did not satisfy this standard. The trial court denied defendant's request for an expert witness after determining that the court itself was able to judge the reasonableness of trial counsel's challenged conduct based on the facts of the particular case, viewed at the time of the conduct.

Michigan courts have permitted expert witness testimony on the standard of care of legal representation at a criminal trial. See *People v Delessandro*, 165 Mich App 569, 573; 419 NW2d 609 (1988). However, defendant offers no binding legal authority to support that such expert testimony is required at an evidentiary hearing. Rather, the trial court has discretion to determine whether expert testimony will assist the factfinder to understand the evidence or to determine a fact in issue. MRE 702. The fact-finder here was a judge, not a jury. There is a presumption that a trial judge possesses knowledge of the applicable law. *People v Sherman-Huffman*, 466 Mich 39, 43; 642 NW2d 339 (2002).

Because the trial court is presumed to have an understanding of the law, there is no evidence that the proposed expert testimony regarding the standard of care for legal representation would have assisted the court in determining whether trial counsel's performance fell below the minimum standard. Although defendant insists that expert testimony was necessary in this case as a substitute for trial counsel's testimony, the expert's proposed

² The trial court declared defendant's trial counsel unavailable to testify for medical reasons. Defendant does not contest this ruling on appeal.

testimony could not enlighten the trial court regarding the actual reasons for trial counsel's conduct. Only trial counsel could explain his trial strategy. Accordingly, we conclude that the trial court did not abuse its discretion by refusing to admit the expert witness testimony at the *Ginther* hearing.

Finally, defendant claims that the trial court abused its discretion in imposing sentences of 50 to 75 years' imprisonment because such lengthy sentences are contrary to sound public policy. We disagree.

Any enumerated felony committed on or after January 1, 1999, is subject to Michigan's sentencing guidelines act, MCL 769.31 *et seq.* MCL 769.34(2); *People v Hendrick*, 472 Mich 555, 560; 697 NW2d 511 (2005). A minimum sentence that is within the appropriately scored statutory sentencing guidelines range must be affirmed unless there was an error in scoring the guidelines or inaccurate information was relied upon to determine the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). According to the record, each of defendant's armed robbery, kidnapping and first-degree criminal sexual conduct convictions fell within the minimum sentence guidelines range of 270 to 900 months' imprisonment. Defendant was sentenced as a fourth habitual offender to minimum sentences of 50 years' imprisonment for each of the enumerated offenses. Defendant does not argue that the guidelines range was scored incorrectly or that inaccurate information was used to determine his sentences. Because defendant's minimum sentences of 50 years' imprisonment are within the minimum sentencing guidelines range for the relevant offenses, we must uphold the sentences. See MCL 769.34(10); *Babcock*, *supra* at 261. This limitation on our review has been determined not to violate the constitutional separation of powers. *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003). Therefore, defendant's public-policy argument regarding his sentencing should more appropriately be addressed to the Legislature.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ Kirsten Frank Kelly